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# In the Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY, and R.J. REYNOLDS TOBACCO COMPANY,

*Petitioners,*

v.

RONALD ACCORD, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

## MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States of America (Chamber) moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief. The Honorable Arthur M. Recht, Circuit Judge for the Circuit Court of Ohio County, West Virginia, who was named as a respondent to the petition for a writ of prohibition from which the instant petition arises, has also consented to the filing of this *amicus* brief. Counsel for the remaining respondents (plaintiffs below) have withheld consent.

The Chamber is the largest federation of business, trade, and professional corporations in the United States. It represents an underlying membership of approximately three million businesses and organizations of every size, in every business sector, and from every geographic region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This is such a case. It presents this Court with a valuable opportunity to clarify and enforce the limitations placed by the Due Process Clause of the Fourteenth Amendment on the authority of state courts to abandon traditional, time-honored safeguards historically observed in the conduct of civil litigation. In recent years, state and federal courts have faced mount-

ing pressure to fashion novel methods for processing a rising tide of complex litigation, including mass-tort cases involving tobacco, asbestos, drugs, medical devices, automobiles, and other products, and sprawling class-action lawsuits against insurance companies, banks, and other businesses.

The circuit court here devised — and the Supreme Court of Appeals of West Virginia approved — a trial plan that casts aside crucial principles of due process articulated by this Court. As a result, business defendants in the West Virginia courts now face the prospect of litigating cases against hundreds of plaintiffs in which fundamental questions of liability and punitive damages are resolved without the introduction of any testimony or evidence specific to a particular plaintiff. Those procedures unfairly hamstring defendants and will yield arbitrary results.

This is no small concern. The massive stakes such litigation presents — and the unlikely prospects of ever vindicating valid legal defenses — drastically limit the practical ability of businesses to endure the ordinary risks of litigation. Moreover, modern mass-tort litigation is a ship capable of calling in any friendly port, and West Virginia consistently ranks as a haven for plaintiffs (and their counsel) seeking outsized recoveries. See HarrisInteractive, *2007 U.S. Chamber of Commerce State Liability Systems Ranking Study*, at 6, 10 (April 17, 2007), available at http://www.instituteforlegalreform.com/lawsuitclimate2007/pdf/Liability_System_Ranking_Study.pdf (nationwide survey of in-house attorneys and senior litigators revealed that West Virginia ranked 50th among states with judicial systems likely to "creat[e] a fair and reasonable litigation

environment"); American Tort Reform Found., *Judicial Hellholes 2006* at 11 (2006), available at http://www.atra.org/reports/hellholes/2006/hellholes2006.pdf (ranking West Virginia as "Hellhole # 1"). As a consequence of the decision below, West Virginia will become an even more powerful magnet for mass-tort litigation in the United States, with ripple effects felt throughout the national economy across a wide array of industries.

In the Chamber's experience, mass litigation in the state courts frequently results in serious threats to the federal constitutional rights of business defendants. The unorthodox trial plan adopted in this case is a prime example of that phenomenon. The Chamber has a substantial interest in ensuring the continued availability of review by this Court of decisions of the state courts that implicate important federal constitutional questions.

The Chamber's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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## BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

## STATEMENT

Respondents are more than 700 individual plaintiffs alleging personal injuries caused by their use of petitioners' tobacco products. Their lawsuits invoke assorted "theories of liability, including strict liability, negligence, breach of express warranty, fraudulent concealment, and civil conspiracy," and claim a variety of disparate injuries. Pet 6. Plaintiffs claim to have "used more than 200 different tobacco products" (not all of which are cigarettes) at various points in time. *Ibid.* Pursuant to West Virginia Trial Court Rule 26.01, *all* of these lawsuits were consolidated in a single proceeding

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[1] Pursuant to S. Ct. Rule 37.2 the Chamber states that the parties' counsel received timely notice of the intent to file this brief. Counsel for petitioners consents to the filing of this brief. The Hon. Arthur M. Recht, Circuit Judge for the Circuit Court of Ohio County, West Virginia, who was named as a respondent to the petition for a writ of prohibition from which this case arises, also consents to the filing of this brief. Counsel for the remaining respondents (plaintiffs below) withheld consent. The Chamber further states that no counsel for a party has authored this brief in whole or in part, and no counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

upon a determination that they contained *some* "common questions of law or fact" and that aggregation would be "expeditious."

At plaintiffs' invitation — and over defendants' repeated objections — the Circuit Court for Ohio County, West Virginia (Hon. Arthur M. Recht, presiding), adopted a two-phase trial plan to dispose of these cases. In Phase I, which is set to commence on March 18, 2008, a jury will decide "[g]eneral liability issues common to all defendants[,] including * * * defective product theory; negligence theory; warranty theory; and any other theories supported by pretrial development." Pet. App. 33a. The Phase I jury will also determine plaintiffs' "entitlement to punitive damages" and establish a multiplier for such awards, but it will hear no evidence regarding any individual plaintiff's conduct or entitlement to relief. *Ibid.* In Phase II, the trial court will convene separate proceedings before new factfinders to "address issues unique to each plaintiff's compensatory damages and any other individual issues in reasonably sized trial groups or on an individual basis." *Ibid.* The Phase II juries' compensatory awards will be automatically increased by any punitive damages multiplier set by the Phase I jury.

Defendants renewed their objections to this "reverse-bifurcation" trial plan in light of *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003). Judge Recht agreed that the plan could not be reconciled with *Campbell*, but the Supreme Court of Appeals of West Virginia reversed that decision. In the wake of this Court's decision in *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007), defendants unsuccessfully sought reconsideration in the trial court, and the West Virginia Supreme Court of Appeals summarily denied defendants' request for a writ of prohibition.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Recognizing that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415, 432 (1994), this Court has repeatedly invalidated state trial practices that facilitate excessive and unprincipled awards. The trial plan adopted below and approved by the West Virginia Supreme Court of Appeals plainly violates those pronouncements and warrants this Court's immediate review.

I. The decision below flatly contradicts this Court's decisions in *Williams*, *Campbell*, and *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 565-66 (1996). Requiring the Phase I jury to decide essential questions "common" to all plaintiffs — including the availability and magnitude of punitive damages — before hearing evidence specific to any individual plaintiff violates this Court's admonition that a defendant facing punitive damages must have "an opportunity to present every available defense." *Williams*, 127 S. Ct. at 1063 (internal quotation marks omitted). Evidence regarding individual plaintiffs — *e.g.*, whether they used a particular product or were aware of its risks — is essential to mount a proper defense against plaintiffs' theories of liability and demands for punitive damages. Under the trial plan adopted here, however, such evidence is categorically excluded until *after* the Phase I jury has reached its verdict. Similarly, this Court warned in *Williams* that the jury ought not be left simply to speculate regarding critical details relevant to a proper analysis of the propriety of punitive damages, see 127 S. Ct. at 1063, but that is precisely what this trial plan requires. The trial plan also flatly ignores *Campbell*'s holding that there must be a specific nexus between the

evidence supporting a punitive damages award and the plaintiff's actual injuries. Here, the aggregation of plaintiffs with widely divergent cases and the deferral of all plaintiff-specific evidence guarantees that such a connection will be absent. Likewise, deciding the question of a punitive damages multiplier before a single compensatory damages award has been fixed prevents a proper assessment of the need for punitive damages in light of the magnitude of compensatory relief. The Supreme Court of Appeals either ignored those defects altogether or excused them on the (mistaken) belief that a Phase II jury or the trial judge can and will correct any errors.

II. This Court need not and should not await completion of those lengthy proceedings before reviewing these important issues. The aggregation of hundreds of plaintiffs — coupled with the distinctly plaintiff-friendly features of "reverse bifurcation" — exerts enormous pressure on defendants to settle these cases rather than face potentially disastrous liability at trial. As a result, this may well be this Court's only opportunity to assess the constitutionality of this trial plan. Moreover, if these cases ultimately do go to trial, it would be far more efficient to obtain this Court's guidance *now*, rather than after the trial court and the parties have devoted the enormous time and resources necessary to conduct proceedings that (we respectfully submit) are constitutionally dubious. And in the years it might take these cases to return to this Court, West Virginia (and other jurisdictions hoping to quickly dispose of mass-tort litigation) will subject numerous other defendants to this unconstitutional scheme.

## ARGUMENT

### I. The Reverse Bifurcation Procedure Devised By The Trial Court Contravenes This Court's Decisions Aimed At Ensuring That Even Unpopular Defendants Receive Due Process

As this Court has long recognized, "it cannot be ignored that punitive damages may be employed to punish unpopular defendants." *International Brotherhood of Elec. Workers* v. *Foust*, 442 U.S. 42, 50 n.14 (1979). Equally important, history teaches that no single class of defendants has a monopoly on a jury's sympathies or is immune from its prejudices. In some social and political climates, the target may be labor unions; in others, it may be management. *Ibid.* Or the jury's passions may be inflamed by political views that — in the heat of a particular moment — are deemed unpopular. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Most recently, the trend has been to levy massive awards against "big businesses, particularly those without strong local presences" in the jurisdictions where the cases are tried. *Honda Motor*, 512 U.S. at 432; see also, *e.g.*, *Campbell*, 538 U.S. at 417; *BMW*, 517 U.S. at 565.

To guard against the ever-shifting caprice juries may inflict upon a particular defendant, this Court has consistently enforced the Due Process Clause's requirement that reason, rather than mere "[c]ommunity hostility," guide juries' verdicts. *Foust*, 442 U.S. at 50 n.14. The trial plan adopted here flouts those principles at every turn, and this Court's review is necessary to make clear that such fundamental constitutional protections may not be cast aside in the name of expediency.

A. Perhaps most obviously, "the Due Process Clause

prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Williams*, 127 S. Ct. at 1063 (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972)). But the system devised here does exactly that, allowing — indeed, *requiring* — the jury to decide essential questions of liability and to establish a punitive damages multiplier without hearing one word about whether a particular plaintiff is legally entitled to such relief. Moreover, although "[c]onfrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life," *Peters* v. *Hobby*, 349 U.S. 331, 351 (1955) (Douglas, J., concurring), not a single plaintiff will take the stand before the Phase I jury reaches its verdict. Far from being able to mount "every available defense," *Williams*, 127 S. Ct. at 1063 (internal quotation marks omitted), the defendants will be precluded from effectively presenting even their most basic answers to plaintiffs' allegations.

That risk is hardly speculative. For example, the plaintiffs here have alleged — among many other legal theories — that defendants are liable for failing to provide adequate warnings of risks associated with their products. In response, the defendants have asserted that plaintiffs "were warned or otherwise made aware of the alleged risks associated with smoking cigarettes, but chose to smoke cigarettes despite having that knowledge." Answer of Defendant Philip Morris Inc. to Plaintiffs' Complaint, *In re Tobacco Litig.*, Civil Action No. 00-C-5000 (W. Va. Cir. Ct.), at 40. How will the defendants be able to present that defense to the Phase I jury unless they are able to take discovery of individual plaintiffs and present relevant evidence to the jury? Likewise, how can the Phase I jury sensibly determine whether to impose punitive damages — much less to set

a specific multiplier by which all compensatory awards must be increased — before it has even heard evidence as to whether the individual plaintiffs were already aware of the health risks they claim should have been the subject of additional warnings? The trial plan raises such questions but offers no sensible answers. Instead, it leaves the jury unable to consider pivotal evidence and arguments before making dispositive findings regarding liability and punitive damages. See *White* v. *Ford Motor Co.*, 500 F.3d 963, 975 (9th Cir. 2007) (plaintiff's conduct must be assessed by jury in evaluating defendant's punitive liability).[2] That is precisely the manifest unfairness that the Due Process Clause prohibits. See *Williams*, 127 S. Ct. at 1063.

B. The trial plan also violates this Court's directive that courts must not introduce "a near standardless dimension to the punitive damages equation" by preventing the jury from considering the full range of circumstances relevant to that inquiry. *Williams*, 127 S. Ct. at 1063. As in *Williams*, the jury here will be asked to opine on the propriety of punitive damages but "will be left to speculate" on any number of important questions: "How many * * * victims are there? How seriously were they injured? Under what circumstances did injury occur?" *Ibid.* These are all potentially

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[2] There are numerous other defenses and arguments highly probative of the questions to be resolved in Phase I but that cannot be meaningfully considered by the jury. For example, evidence that plaintiffs were actually aware of the dangers of smoking would also be relevant to West Virginia's doctrine of "'modified' comparative negligence," under which "a party can recover damages in a tort action [only] 'so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident.'" *Honaker* v. *Mahon*, 552 S.E.2d 788, 792 n.3 (W. Va. 2001) (quoting *Bradley* v. *Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979)).

significant factors in a jury's decision whether and to what extent punitive damages are appropriate, but the Phase I jury will be deprived of that crucial context.

That myopic view of the evidence only magnifies the risk — inherent in any case where the jury is asked to determine punitive liability and elements of compensatory liability simultaneously — that bias will infect the jury's verdict. Recognizing the hazards of presenting the inflammatory and prejudicial evidence often introduced during punitive damages proceedings before the jury has decided threshold questions of liability, several jurisdictions permit or require courts to *defer* consideration of the punitive-damages question. See, *e.g.*, *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Transportation Ins. Co.* v. *Moriel*, 879 S.W.2d 10 (Tex. 1994); Cal. Civ. Code § 3295(d) (West 2007); Minn. Stat. Ann. § 549.20 (West 2007). Several leading organizations have called for the adoption of similar procedures.[3] West Virginia, by contrast, *accelerates* their consideration, even as it blocks the jury from evaluating a range of factors that might temper the jury's passions. Thus, the trial plan approved here not only injects

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[3] See American Bar Association, Section of Litigation, Special Committee on Punitive Damages, *Punitive Damages: A Constructive Examination* 6-3 - 6-4 (1986) ("It is apparent that the jury hearing evidence during the compensatory damages trial that is relevant only to the punitive damages claim (*e.g.*, the wealth of the defendant, other wrongful acts, the risks the defendant took) may be unduly influenced by that type of proof even on the issue of liability * * *."); American Law Institute, Reporters' Study, *Enterprise Responsibility for Personal Injury*, Vol. II at 264 (1991) ("[J]udges should have the power to bifurcate the trial in these cases so that the evidence and instructions specifically related to the punitive damages claim would be put to the (same) jury in a second proceeding *following* a positive verdict on the compensatory claim.") (emphasis added).

"standardless" speculation into the jury's assessment of punitive liability (in clear violation of *Williams*), it further opens the door for bias to influence the jury's entire verdict.

C. Likewise, the trial plan also ignores *Campbell*'s clear holding that conduct forming the basis of a punitive damages award "must have a nexus to the specific harm suffered by the plaintiff." 538 U.S. at 422. The plan requires Phase I jurors to evaluate whether punitive damages are appropriate — and, if so, to establish a multiplier to be applied to future compensatory awards — before hearing any evidence about "the specific harm" a particular plaintiff has suffered or how any such injury might relate to the conduct upon which a punitive damages award is based. Consequently, any "nexus" between the punitive damages finding and the actual harm a particular plaintiff might have suffered is purely coincidental.

As this Court explained in *Campbell*, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant," *id.* at 423, but that is precisely what this trial plan would do. It asks the jury to hypothesize that the conduct supporting a punitive damages award would relate to every plaintiff's injury. To illustrate, suppose the Phase I jury concluded that the defendants' marketing of "light" cigarettes warrants the imposition of punitive damages and a particular multiplier. Such a finding would bear no connection to a plaintiff who later reveals (in discovery or at trial) that he did not even smoke light cigarettes. Thus, contrary to the clear holding of *Campbell*, this trial plan authorizes the Phase I jury to assess whether defendants ought to be punished $x$ times over for conduct that may be — and in many instances no doubt

*will* be — entirely unrelated to a particular plaintiff's injury.

The West Virginia Supreme Court of Appeals acknowledged *Campbell*'s holding that "'[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages,'" Pet. App. 39a (quoting 538 U.S. at 422-23), but it failed to apprehend how that principle is utterly irreconcilable with the trial plan at issue here. Rather, that court casually dismissed *Campbell*'s guidance because "the facts in [that case] were quite extreme." Pet. App. 39a. But there is nothing in *Campbell* to suggest that the nexus requirement must be enforced only in "extreme" cases.

Moreover, it is no answer to suggest that such errors could be addressed in the Phase II proceedings. See Pet. App. 39a, 41a-42a & n.4. For starters, the *mere potential* for correction does not automatically ensure due process. To the contrary, this Court has held that "state courts cannot authorize procedures that create an unreasonable and unnecessary *risk*" that punitive damages awards will be based on illegitimate considerations. *Williams*, 127 S. Ct. at 1065 (emphasis added). Far beyond creating the "risk" of unconstitutional awards, this trial plan — coupled with the elimination of a class-certification process designed to ensure that the aggregated plaintiffs present predominately common claims — effectively *guarantees* significant and repeated errors. The Phase I jury will consider an amalgam of evidence, only some of which is pertinent to a given plaintiff, and render a verdict on the propriety and magnitude of a punitive damages award for every plaintiff. Standing alone, that fundamental error renders the trial plan unconstitutional regardless of what may happen in Phase II.

In any event, it is difficult to see how Phase II proceedings would reliably establish a constitutionally adequate nexus. The trial plan contemplates that the Phase II jury will decide only questions of causation specific to a particular plaintiff and make findings on the appropriate compensatory damages. Those damages *automatically* will be increased according to the Phase I jury's constitutionally deficient multiplier. The Phase II jury's verdict will thus suffer from the same flaw inherent in the Phase I multiplier. And, contrary to the (unexplained) assertion of the West Virginia Supreme Court of Appeals, the Phase II trial judge cannot simply "ensure that the plaintiffs' evidence is relevant, reasonably related to the acts upon which liability is premised, and supports their claim for punitive damages." Pet. App. 39a. That is because evidence supporting the decision to award punitive damages already will have been admitted (and the multiplier established) in Phase I, long before the circuit judge is even capable of comparing it to the evidence regarding a particular plaintiff's injuries in Phase II. The time to ensure that only constitutionally appropriate evidence supports a punitive damages award is when the jury is considering the propriety and magnitude of a punitive damages award.

D. The trial plan also frustrates compliance with this Court's instruction to assess the need for and magnitude of punitive damages in light of the size of the compensatory award. See *Campbell*, 538 U.S. at 425; *BMW*, 517 U.S. at 582. Here, the Phase I jury will be asked to set a multiplier without knowing what the compensatory damages will be or even hearing evidence regarding the injuries suffered by a particular plaintiff. Jurors therefore will have no way of knowing whether "compensatory damages are substantial," which would warrant "a lesser ratio, perhaps only equal to compensatory damages." *Campbell*, 538 U.S. at 425. To be sure,

the Phase II trial judge must review the "disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award," *id.* at 418, but this is just another way in which the trial plan adopted below *predicts* error by the jury in the hope that the judge will be willing and able to correct every mistake. As noted above, this Court has held that state courts may not "authorize procedures that create an unreasonable and unnecessary *risk*" of constitutional error, *Williams*, 127 S. Ct. at 1065 (emphasis added), but that is what this plan plainly intends.

West Virginia's reliance on such a scheme is particularly problematic because that State has no intermediate appellate court to which a defendant may appeal as of right. W. Va. Code Ann. 51-1-3 (West 2007). If defendants fail to convince the trial judge that a final award is constitutionally infirm, their only recourse is discretionary review by the Supreme Court of Appeals, which historically grants less than one-third of petitions to review civil judgments. See Supreme Court of Appeals of West Virginia Statistical Report 5 (2005), available at http://www.state.wv.us/wvsca/clerk/statistics/2005StatRept.pdf. As this Court has recognized, however, close appellate scrutiny of a trial court's review of punitive damages awards may correct significant errors in the lower court's analysis. See *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 440-43 (2001) (holding that district court's review punitive damages award subject to *de novo* appellate review and highlighting numerous errors in the district court's analysis). Under the trial plan approved here, the defendants face potentially staggering punitive damages awards that are likely to be reviewed only by a single judge. The suggestion that such meager judicial review will take proper account of the constitutionally necessary relationship between

compensatory and punitive damages awards (and of other constitutional requirements, see, *e.g.*, *id.* at 440) is cold comfort indeed. A system so deliberately indifferent to the risk that a punitive damages award will be constitutionally deficient does not comport with the fundamental guarantees of due process.

## II. This Court Need Not — And Should Not — Delay Review Of The Trial Plan

As petitioners correctly note (Pet. 1), the order of the Supreme Court of Appeals denying their petition for a writ of prohibition is fully amenable to this Court's immediate review. What is more, that Court's lengthy majority and concurring opinions leave no doubt that the West Virginia courts will not fully correct the numerous constitutional defects inherent in the trial plan. Those flaws are manifest, and this Court need not await the predictable and severe prejudice they will inflict upon defendants and their shareholders.

But there are still more (and perhaps less obvious) reasons why this Court's immediate review is necessary. First and foremost, this scheme puts enormous pressure on defendants to settle, rather than risk massive and multiple punitive damages awards; consequently, the instant petition may present this Court's only opportunity to decide these important questions. Moreover, there are obvious advantages to deciding these threshold issues *before* the trial court and the parties devote massive resources to executing a constitutionally dubious trial plan. And in the years it likely would take this case to wind its way back to this Court, West Virginia will continue to attract and subject mass-tort litigation to this bizarre trial scheme.

A. This petition may well be this Court's only opportunity to pass on the significant constitutional

questions presented here. That is because reverse bifurcation of large, aggregated cases places enormous pressure on defendants to settle, rather than endure proceedings in which the outcome is all but predetermined, the financial consequences are potentially disastrous, and the chance of meaningful appellate review is slim.

Federal courts recognize that, in certain cases involving the aggregation of numerous plaintiffs and the concomitant prospect of massive liability, delaying review is tantamount to denying it altogether. As Judge Posner has explained, deferred review "will come too late to provide effective relief" for some defendants due to "the sheer *magnitude* of the risk to which [an aggregation plan] * * * exposes them." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (granting extraordinary remedy of mandamus to review questionable class certification). Accordingly, defendants facing potentially massive damages awards produced by flawed trial procedures, "may not wish to roll [the] dice" to fully litigate the issue and "will be under intense pressure to settle." *Id.* at 1298; see also *In re Chevron*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring) (mandamus review of trial plan in a mass proceeding of 3,000 cases "aggregated for trial management" was necessary because "[t]he pressure on the parties to settle in fear of the result of a perhaps all-or-nothing 'bellwether' trial is enormous").

This Court recognized the same concern when approving Federal Rule of Civil Procedure 23(f), which grants courts of appeals discretion to accept interlocutory review of a district court's "order granting or denying class-action certification." That provision rests in part on a the pragmatic concern that "[a]n order

granting [class] certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 Advisory Committee Note; see also *Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000) (noting that one purpose of Rule 23(f) is to "provide[] a mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial"). Likewise, the courts of appeals acknowledge that "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order" if the lower court's ruling is "questionable." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).[4]

The trial plan approved below presents settlement pressures equal to (and perhaps greater than) a suspect class-certification decision. As explained above, the aggregation of so many plaintiffs raises the concern that the risk of massive liability will lead defendants to settle without regard to the merits of the underlying case. See also Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts, 187 F.R.D. 293, 305 (1999) ("[A]ggregated plaintiffs may acquire power that dispersed individual plaintiffs would lack, enhancing — and perhaps exaggerating — their

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[4] Accord *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164-65 (3d Cir. 2001); *Lienhart* v. *Dryvit Sys., Inc.*, 255 F.3d 138, 142-43 (4th Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000).

underlying substantive rights."); Kenneth Bordens & Irwin Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 LAW & PSYCHOL. REV. 43, 59 (1998) (reporting finding that "the amount of responsibility assigned to the defendant" by juries increased "as the size of the nontrial plaintiff population increased" in mass litigation); Richard Faulk *et al.*, *Building a Better Mousetrap? A New Approach To Trying Mass Tort Cases*, 29 TEX. TECH L. REV. 779, 790 (1998) (noting that large aggregations raise the same settlement concerns as class actions). Moreover, recent experience proves that juries have shown little reluctance to levy massive — and constitutionally improper — punitive damages verdicts upon tobacco companies. In *Williams*, for example, the jury awarded $821,000 in compensatory damages and $79.5 *million* in punitive damages in a single-plaintiff case. See 127 S. Ct. at 1061. This case — which consolidates claims by more than 700 smokers — presents the palpable risk of awards totaling *billions* of dollars.[5]

Indeed, many mass-tort defendants in West Virginia confront what one commentator has called the "Armageddon scenario." Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 89, 98 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School) (Eskridge Statement).

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[5] The Chamber does not mean to suggest that such damages are inevitable (much less proper), but that very real possibility cannot be ignored. If Phase II juries award anything approaching the compensatory award in *Williams* to even a substantial percentage of the 700-plus plaintiffs, damages could reach well into the hundreds of millions of dollars *before* the Phase I jury's punitive damages multiplier is applied.

Faced with the prospect of "losing the company on his or her watch," a general counsel or chief executive officer will often seek to settle even if convinced of the merit of the company's position. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligations in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 252 (2001); see also Eskridge Statement, *supra*, at 98 ("Even risk-neutral people and firms will tend to take too many precautions or pay too high a settlement price when the chance of devastating loss is significant.").

As if the prospect of billions of dollars in liability were not enough to coerce settlements, the circuit court's cavalier approach toward aggregation adds to those pressures. Because there has been no attempt to ensure meaningful commonality among their allegations — *i.e.*, products used, injuries sustained, or theories of liability — the Phase I proceedings will lump together widely divergent claims. While defendants ordinarily could evaluate each discrete class of plaintiffs with a view to settling those cases presenting the most significant litigation risks, that option is not realistically available here. The risk of not settling cases filed by less-deserving plaintiffs is that a jury will not carefully discriminate among the various individual claims but will simply lump them together in returning a verdict for all plaintiffs on liability, coupled with a hefty punitive damages multiplier. See, *e.g.*, *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (aggregation "magnifies and strengthens the number of unmeritorious claims"). Indeed, empirical research shows that "aggregation of most-injured plaintiffs with less-injured plaintiffs significantly increased the mean awards to the latter." Eskridge Statement, *supra*, at 96. Moreover, there is anecdotal evidence suggesting that, in some mass-tort cases, plaintiffs' lawyers and courts

will not permit defendants to settle the claims of the most sympathetic plaintiffs unless they agree to settle the claims of other plaintiffs as well.[6] Aggregation without adequate commonality thus forces defendants to take account of weak cases that might not otherwise figure in their settlement calculations.

These enormous settlement pressures are further magnified by the trial plan's decided tilt in favor of plaintiffs. As explained above (see pages 5-13, *supra*), the reverse bifurcation procedure prevents defendants from fully presenting their defenses; invites near-standardless speculation by the jury; lacks a constitutionally adequate nexus between a punitive damages award and a given plaintiff; and prevents proper evaluation of the need for punitive damages in light of the actual compensatory award. Thus, defendants' prospects for weathering both phases of these proceedings and then re-presenting this issue for review are grim.

B. Even if this case were to proceed to trial, there are obvious advantages of judicial economy to be gained by deciding this issue now. With so much at stake, the Phase I proceedings will be particularly lengthy and complex. And, because the circuit court has allowed the aggregation of 700-plus plaintiffs presenting a welter of claims and theories, the evidence necessary to resolve those questions will be sprawling. But that is only the

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[6] See Griffin Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, Briefly ... Perspectives on Legislation, Regulation, and Litigation (Nat'l Legal Ctr. for the Public Interest, Washington, D.C.), June 2002, at 23; Victor Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 255 (2000).

tip of the iceberg, because anything short of complete victory for defendants in Phase I will permit scores or hundreds more Phase II proceedings to begin before a final damages figure for individual plaintiffs is established and further review in this Court can be obtained.

The toll on the parties' resources will be even more severe. Litigating these cases to completion will consume tens of thousands of attorney hours, and both sides will incur significant additional expenses — all of which will be for naught if this trial plan is later held unconstitutional. Indeed, plaintiffs' eagerness to avoid this Court's review (Br. in Opp. 12-13) may prove penny-wise and pound-foolish. It is far better to resolve serious threshold constitutional questions now — under the relatively short timetable this Court customarily observes — than to waste years conducting constitutionally defective trials. Indeed, for all of the emphasis plaintiffs and the Supreme Court of Appeals have placed on the "just, speedy, and inexpensive determination" of these actions, Pet. App. 58a (Starcher, J., concurring), resistance to this Court's immediate review is puzzling.

C. Finally, delaying review would make West Virginia even more of a magnet for mass-tort litigation, increasing the risk that still more defendants will be subjected to the pressures and prejudices of this trial scheme. It is no secret that West Virginia is one of the most plaintiff-friendly jurisdictions in the country. See HarrisInteractive, *2007 U.S. Chamber of Commerce State Liability Systems Ranking Study*, at 6, 10 (April 17, 2007), available at http://www.institutefor legalreform.com/lawsuitclimate2007/pdf /Liability_System_Ranking_Study.pdf (nationwide survey of in-house attorneys and senior litigators

revealed that West Virginia ranked last among states with judicial systems likely to "creat[e] a fair and reasonable litigation environment"). Similarly, in 2006 critics ranked West Virginia as "Judicial Hellhole # 1" and observed that — due in large part to the practical unavailability of summary judgment and the lack of any mandatory appellate review — "there seems to be no reasonable limit on damages in the Mountain State." American Tort Reform Found., *Judicial Hellholes 2006*, at 11 (2006), available at http://www.atra.org/reports/hellholes/2006/hellholes2006.pdf ("2006 ATRA Report"). The lure of plaintiff-friendly trial plans such as the one approved here only exacerbates those problems.

Ironically, one of the principal justifications advanced in defense of West Virginia's unorthodox trial plan is the fear that relying on traditional trial methods would cause "administrative gridlock." Pet. App. 57a (Starcher, J., concurring). But any such mess is entirely of West Virginia's own making. As the very judge who is set to try these cases has acknowledged: "'West Virginia was a "field of dreams" for plaintiffs' lawyers. We built it and they came.'" 2006 ATRA Report at 11 (quoting public statement of Hon. Arthur M. Recht). Indeed, the Supreme Court of Appeals recently invalidated (in significant part) an attempt by the West Virginia legislature to amend the State's venue laws to limit the ability of out-of-state plaintiffs to bring their claims to West Virginia's courts. See W. Va. Code Ann. § 56-1-1(c) (West Supp. 2003) ("[A] nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."); *Morris* v. *Crown Equip. Corp.*, 633 S.E.2d 292, 300 (W. Va. 2006) (striking down same under federal Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, as applied "to civil actions filed against West Virginia

citizens and residents"). The legislature then repealed that provision entirely, W. Va. 2007 Session Laws, Reg. Session, Ch. 1 (H.B. No. 2956) (Apr. 4, 2007), leaving a corporate defendant subject to suit in West Virginia if it "does business" in the state, West. Va. Code. Ann. § 56-1-1(1)(a)(2) (West 2007). Thus, West Virginia remains — by design, it would seem — a "Mecca" for tort litigation, and this Court's immediate review is necessary to ensure that future defendants are not prejudiced while this case winds its way through the courts.

## CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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